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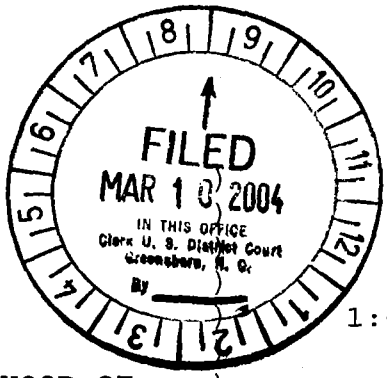
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



SIDNEY ANN McCOLLUM,

Plaintiff,

v. 1:03CV00355

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS,

Defendant.

MEMORANDUM OPINION

OSTEEN, District Judge

Plaintiff Sidney Ann McCollum brings this action against her union, Defendant International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (the "IBB"), alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Now before the court is Defendant's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated herein, Defendant's motion will be granted.

I. BACKGROUND

The following facts are presented in the light most favorable to Plaintiff.[1]

Plaintiff is a 56-year-old female journeyman boilermaker mechanic with 24 years of experience in the building and trade construction industry. She is a member in good standing of the Local 30 chapter of the IBB.

Defendant has a contract with Babcock & Wilcox, Inc. ("B&W"), to provide union workers for a boiler repair project at Duke Power's Belews Creek plant in Stokes County, North Carolina. Under Defendant's usual rules, members are selected for employment based on the length of time they have been out of work. In addition, workers with more experience have priority over those with less. In this case, however, Defendant agreed to a "100% selectivity rule," which gave B&W the discretion to hire workers without regard to Defendant's usual rules of priority.

On November 4, 2002, members of Local 30 began work at Belews Creek for B&W, although neither Plaintiff nor any other female member was selected for employment. On January 2, 2003, Plaintiff was informed by the business manager for Local 30 that a position as a boilermaker was available for her at the Belews

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[1] When considering a motion to dismiss, the court must evaluate the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded factual allegations. Randall v. United States, 30 F.3d 518, 522 (4th Cir. 1994).

Creek plant. Plaintiff reported to the plant on January 6, 2003, but was denied employment by B&W. On January 7, 2003, Plaintiff was informed by an IBB official that IBB Vice President Newton Jones had given B&W permission to refuse Plaintiff employment.

On January 17, 2003, Plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination on the part of both B&W and Defendant. She was thereafter allowed to commence work at the Belews Creek plant on January 20, 2003. On February 3, 2003, after the EEOC had issued a dismissal and right to sue letter against both B&W and Defendant, Plaintiff was laid off while less experienced and less qualified males were allowed to continue employment.

Plaintiff filed this action against Defendant on April 22, 2003, alleging discrimination in violation of Title VII. Defendant has moved to dismiss Plaintiff's claims for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II. DISCUSSION

A court should dismiss a case for failure to state a claim upon which relief can be granted "only in very limited circumstances." Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989). Dismissal should not be granted "unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to

relief." Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993).

Here, Defendant argues not that the complaint fails to state any claim, but that it fails to state a claim against the IBB. Defendant suggests instead that the complaint may state a claim against B&W, and Plaintiff has in fact filed an action against B&W in this court.[2] Defendant insists that any adverse employment action taken was by B&W, and, as such, Defendant cannot be held liable.

Unions can be held liable under Title VII for gender discrimination. Title VII provides that it is an unlawful employment practice for a union "to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his . . . sex." 42 U.S.C. § 2000e-2(c)(1). Additionally, it is unlawful for a union to "limit, segregate, or classify its membership . . . or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee" on the basis of sex. Id. § 2000e-2(c)(2). Finally, it is unlawful for a union to "cause or attempt to cause an employer to discriminate

[2] McCollum v. Babcock & Wilcox, Inc., No. 1:03CV366.

against an individual in violation of this section." Id. § 2000e-2(c)(3).

Plaintiff maintains that Defendant is liable under all three subsections. Plaintiff asserts that Defendant's approval of the 100% selectivity rule "satisfies the sufficiency requirements of 42 U.S.C. § 2000e-2(c)(1) (defendant's allowing discrimination based upon sex) and 42 U.S.C. § 2000e-2(c)(2) (defendant's depriving female members . . . of the full rights of membership in the union)." (Pl.'s Mem. Opp'n Mot. Dismiss at 2-3.) Plaintiff appears to be misconstruing the prohibitions of § 2000e-2(c). For example, subsection (c)(1) does not, as Plaintiff suggests, prohibit "defendant's allowing discrimination based upon sex." (Id. at 2.) Instead, it prohibits exclusion, expulsion, or actual discrimination by a union based on an impermissible classification. Plaintiff was not expelled or excluded from membership in the IBB, and "allowing discrimination" is not sufficient to violate Title VII under the language of subsection (c)(1). Moreover, to the extent Plaintiff's complaint does allege facts amounting to actual discrimination, the improper acts were done by B&W, not Defendant. It was B&W who turned Plaintiff away on January 6, 2003, and it was B&W who terminated her employment on February 3, 2003. Defendant did not make these purportedly discriminatory

decisions. As such, Plaintiff fails to state a claim against the IBB under § 2000e-2(c)(1).[3]

Plaintiff next asserts that Defendant's approval of the 100% selectivity rule deprives female union members of their seniority rights in violation of subsection (c)(2). While it is true that the 100% selectivity rule gave B&W the right to hire workers without regard to their priority under traditional union rules, the 100% selectivity rule could not give B&W the right to violate Title VII and hire males to the exclusion of females on the basis of gender. Moreover, and perhaps most importantly, Plaintiff does not allege that Defendant agreed to the 100% selectivity rule in order to discriminate on the basis of gender. All

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[3] A union may also violate Title VII by failing to file discrimination claims on a member's behalf because the member belongs to a minority group. Thorn v. Amalgamated Transit Union, 305 F.3d 826, 832 (8th Cir. 2002) (citing Goodman v. Lukens Steel Co., 482 U.S. 656, 666-69, 107 S. Ct. 2617, 2623-25 (1987)); York v. AT&T Co., 95 F.3d 948, 956 (10th Cir. 1996). In order to establish this type of discrimination, a plaintiff must prove that (1) the employer violated the collective bargaining agreement between the union and the employer, (2) the union breached its duty of fair representation by failing to contest the employer's violation, and (3) there is some evidence of animus against a protected class among the union. Equal Employment Opportunity Comm'n v. Reynolds Metals Co., 212 F. Supp. 2d 530, 539-40 (E.D. Va. 2002) (citing Greenslade v. Chicago Sun-Times, Inc., 112 F.3d 853, 866 (7th Cir. 1997)). Essential to proving such a claim is evidence that the union knew of the employer's discrimination and that the union decided not to assert the employee's discrimination claim. York, 95 F.3d at 956-57. Plaintiff's complaint makes no mention of a request by her for Defendant to represent her or a decision by Defendant not to represent her. The complaint thus cannot be read to state a claim for Defendant's failure to represent Plaintiff in a claim against B&W.

Plaintiff alleges is that the rule "had the effect of discriminating against plaintiff . . . in that it has allowed B&W to refuse to employ female persons due to their gender." (Compl. ¶ C.3.) Plaintiff has not alleged that Defendant intended that the rule be used in a discriminatory fashion; rather, Plaintiff has alleged that B&W used the rule in an impermissible manner. On its face, the rule agreed to by Defendant is neutral. To the extent B&W's application of the discretion granted by Defendant has violated federal law, Plaintiff's claim would be against B&W, not the IBB.

Finally, Plaintiff turns to § 2000e-2(c)(3), which makes it unlawful for a union to "cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U.S.C. § 2000e-2(c)(3). A claim under this subsection requires more than "passive acquiescence" by a union in an employer's wrongful discrimination. Thorn v. Amalgamated Transit Union, 305 F.3d 826, 833 (8th Cir. 2002); accord Anjelino v. New York Times Co., 200 F.3d 73, 95-96 (3d Cir. 1999) (holding that a claim under this subsection requires that the union "instigate[] or actively support[] the discriminatory acts" of the employer). Such a claim requires "active participation" by the union. Thorn, 305 F.3d at 833. Plaintiff points to the adoption of the 100% selectivity rule as well as her claim that IBB Vice President Jones gave permission for B&W to refuse Plaintiff

employment as examples of the IBB's violations of subsection (c)(3). As noted above, the adoption of the 100% selectivity rule only gives B&W broader discretion in hiring than it would normally have under the collective bargaining agreement with the IBB. The rule cannot sanction employment decisions by B&W that violate Title VII. Even to the extent that B&W may have violated Title VII in its hiring practices, it does not follow that Defendant caused or attempted to cause B&W to discriminate merely by giving it broader hiring discretion.[4]

Plaintiff's allegation that Jones gave permission for B&W to refuse to employ her is also insufficient to state a claim under § 2000e-2(c)(3). Plaintiff has not alleged that Jones or Defendant controlled or induced B&W to refuse Plaintiff employment. All Plaintiff alleges is that B&W sought and received the permission of Jones to refuse to hire her. There is no allegation that the IBB knew whether the denial of employment was done for legitimate or discriminatory reasons. The permission given by Jones, which seems unnecessary given the discretion the 100% selectivity rule appears to grant B&W, is not the type of purposeful action required to state a claim under § 2000e-2(c)(3).

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[4] As was noted above, Plaintiff has alleged that the rule "had the effect of discriminating against [her]," Compl. ¶ C.3, but not that the IBB caused or intended to cause discrimination by enacting the rule.

III. CONCLUSION

Plaintiff has primarily stated claims against B&W.[5] Plaintiff has failed to allege any violation of Title VII against the IBB, and, as such, Defendant's motion to dismiss will be granted. A judgment in accordance with this memorandum opinion will be filed contemporaneously herewith.

This the 10th day of March 2004.

United States District Judge

[5] Besides her allegations of discrimination, Plaintiff may also have stated a claim of retaliation in violation of 42 U.S.C. § 2000e-3(a) inasmuch as B&W terminated her employment after she filed a charge with the Equal Employment Opportunity Commission. Although labor organizations can be liable under § 2000e-3(a), Plaintiff has not alleged that the IBB had anything to do with her termination after she filed her charge with the Commission, let alone that the IBB had principal responsibility for the decision to fire her. See Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 288-89 (4th Cir. 2004) (en banc) (holding in the context of employer discrimination that a supervisor must be "the one 'principally responsible' for, or the 'actual decisionmaker' behind" an adverse employment action for the employer to be liable). As such, Plaintiff has not alleged a retaliation claim against the IBB.